Supreme Court, U.S.
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No. 98-751

In The

Supreme Court of the United States

October Term, 1998

HECLA MINING COMPANY,

Petitioner,

v.

WASHINGTON WILDERNESS COALITION,
OKANOGAN HIGHLANDS ALLIANCE,
AND ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's application in this case of uniform Supreme Court and appellate court precedent on fee awards in public interest cases provide any reason to grant a writ of certiorari?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, respondents state that they have no parent companies, subsidiaries, or affiliates.

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STATEMENT OF THE CASE

Petitioner Hecla Mining Company ("Hecla") maintains a thirty-eight acre impoundment, called Aspen Pond, at its facility just upstream from the city of Republic, Washington, to hold wastewater and tailings from its mining and milling operation. Petitioner's App. B, at 8a. The unlined impoundment, full of cyanide and heavy metals, is perched next to and above Eureka Creek, which runs down through the city of Republic. Aspen Pond discharges contaminated wastewater at several points. Petitioner's App. B, at 8a-9a. Hecla's own monitoring data show that toxic pollutants are escaping from Aspen Pond, and Hecla knew as early as 1984 that "seepage was out of control." Petitioner's App. B, at 18a. The collection systems that Hecla installed to capture this seepage are not effective, and contaminated wastewater flows via ground and surface water into the Eureka Creek watershed and down through the city of Republic. Petitioner's App. C, at 41a.

In 1994, the state of Washington issued a permit expressly prohibiting Hecla from discharging pollutants from Aspen Pond. Petitioner's App. B, at 11a.[1] Despite this prohibition on discharges from Aspen Pond, and according to Hecla's own data, Hecla discharges 31 million gallons of wastewater from Aspen Pond into the Eureka Creek watershed every year.[2] Cyanide, a highly

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[1] Respondents dispute Hecla's statement that Hecla's prior permits authorized it to discharge to ground and surface water (Petition at 6).

[2] Respondents dispute petitioner's statement that DOE knew and understood that illegal discharges were occurring.

toxic chemical traceable only to Hecla's facility, has been detected in the surface waters of Eureka Creek just outside city limits. Metals associated with mine waste have been detected in city wells at levels just below state standards, and the state of Washington has ordered Hecla to monitor city wells for contamination from the mine site.[3] Respondents' members work in Republic, live near the mine site, and recreate next to a pond that has been contaminated by Hecla's illegal discharges.[4]

Government regulatory efforts were not effective in controlling Hecla's illegal discharges. The Washington Department of Ecology's (DOE's) regional director testified at trial that the DOE has a single enforcement officer for all of Eastern Washington, and that the agency's budget has been steadily reduced during the last five years. Because Hecla's discharges are illegal and harm or threaten the health, recreational, and aesthetic interests of respondents' members, respondents brought this case alleging violations of the Federal Water Pollution Control

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Petition at 6. Nothing in the record supports this statement. At most, DOE knew some leakage was occurring, but assumed bypass-collection systems interrupted and returned those discharges to the pond.

[3] Respondents dispute Hecla's statement that "there was absolutely no harm to the environment." Petition at 19. Respondents demonstrated extensive environmental harm from cyanide and heavy metals.

[4] Respondents dispute Hecla's statement that respondents are "well-funded professional organizations." Petition at 20. There is absolutely no evidence to support this statement. It was not raised below, and it simply is not true.

Act ("Clean Water Act" or "CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 33 U.S.C. §§ 1251-1387; 42 U.S.C. §§ 9601-9675.

The district court informed the parties, several days before trial, that it intended to empanel an advisory jury pursuant to Federal Rule of Civil Procedure 39(c). At that point, respondents elected to simplify the case by pursuing only the CWA claim. After a seven-day trial, the jury found that Hecla had violated the CWA and recommended that the court impose $295,000 in penalties. Petitioner's App. B, at 7a, 18a. The court, however, granted Hecla's post-trial motion to dismiss for lack of standing. Petitioner's App. B, at 36a. Following the court's judgment, Hecla filed a motion for expert witness and attorneys fees, and argued that respondents' claims were frivolous and brought in bad faith. The district court rejected the motion. Petitioner's App. C, at 51a. The court found that respondents had "proved a Clean Water Act violation" and reasoned that "when a party makes out a factual case and fails only in its jurisdictional case, it is difficult to characterize the claim as unreasonable or without foundation." Petitioner's App. C, at 42a. The court also rejected Hecla's argument that respondents' CERCLA claim lacked foundation. Although respondents elected not to pursue the CERCLA claim at trial, the Court nevertheless considered the CERCLA issues presented to be meritorious. Petitioner's App. C, at 45a-48a.[5]

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[5] Respondents dispute Hecla's assertion that the case "was brought merely on principle for a purely paper violation." Petition at 19. Nothing in the record supports this statement and

In making its fee determination, the district court followed the Ninth Circuit's decision in *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236 (9th Cir. 1995), which in turn followed this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Acknowledging that it could not meet *Razore's* standard, Hecla asked the Ninth Circuit to overturn its decision in *Razore* on the same legal grounds that Hecla raises in its petition to this Court.[6] The Ninth Circuit declined to do so, and affirmed the district court's decision to deny Hecla's request for fees. Petitioner's App. A, at 4a.

ARGUMENT

The CWA and CERCLA authorize courts to award attorney fees "to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 33 U.S.C. § 1356(d); 42 U.S.C. § 9659(f). The Ninth Circuit, drawing directly from this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), awards fees to prevailing defendants only if the defendants establish that the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir.

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it is contradicted by the complaint and motions, which address serious and substantive violations of the CWA and CERCA.

[6] Respondents appealed the district court's standing decision, and the Ninth Circuit affirmed that decision in the same unpublished opinion denying Hecla's fee appeal. *See* Petitioner's App. A. Respondents elected not to cross-petition for certiorari.

1995) (citing *Christiansburg*). *See also Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (applying same standard under 42 U.S.C. § 1988). This standard is not unique to the Ninth Circuit. *See infra* Part II (listing cases). The standard, moreover, is consistent with the plain language and Congressional objectives of the CWA and CERCLA.

Hecla's petition, without citing any disagreement among the circuits of the federal court of appeals, or any conflict with previous opinions of this Court, asks this Court to consider adopting a new standard – one that would remove all limits on judicial discretion and allow courts to award fees against meritorious, but non-prevailing, citizen respondents. Such a standard would undermine the very reason that Congress authorized citizen suits in the Clean Water Act and CERCLA – to encourage citizen enforcement of those Acts.[7] For the reasons

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[7] Although Hecla refers ominously to an increase in the number of citizen enforcement actions filed since the CWA was adopted in 1972, Hecla fails to disclose what percentage have been resolved against plaintiffs. An increase in the number of meritorious citizen enforcement actions provides benefits Congress intended. *See* D. Hodas, *Enforcement of Environmental Law In a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?* 54 Md. L. Rev. 1552, 1574 (1995) ("only extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool."). Congress has acknowledged: "Citizen suits are a proven enforcement tool. They operate as Congress intended – to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains." S. Rep. No. 99-50, at 28 (1985). More enforcement means more compliance with the CWA and

explained below, Hecla's petition for a writ of certiorari should be denied.

I. PETITIONER'S ASSERTION THAT THE CWA AND CERCLA GRANT UNCONTROLLED DISCRETION TO AWARD FEES AGAINST MERITORIOUS PLAINTIFFS IS INCORRECT

The plain language of the CWA and CERCLA establishes that Congress intended that courts take into account the goal of encouraging citizen enforcement when awarding fees. *See* 33 U.S.C. § 1365(d); 42 U.S.C. § 9659(f) ("The court . . . *may* award costs of litigation (including reasonable attorney and expert witness fees). . . . ") (emphasis added). Hecla argues, however, that because the statute provides discretion, judicial decisions cannot restrict that discretion by limiting fee awards to defendants to cases that are frivolous or unreasonable. Petition at 10-15. But courts routinely develop rules that bound the exercise of statutorily authorized discretion. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("Although the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits."). In fact, that is what this Court did in *Christiansburg, supra*, with respect to Title VII. And in this case, Congress specifically included the phrase "whenever . . . appropriate" in the statutory language to guide the exercise of discretion in

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greater environmental protection. The fact that petitioners would prefer less enforcement of the CWA is not a reason for granting a writ of certiorari.

awarding fees.[8] Hecla's "plain meaning" analysis overlooks both this statutory guide to judicial discretion and this Court's historic role in guiding the exercise of discretion to award fees.

A. The Term "Whenever . . . Appropriate" Should Be Interpreted In Light Of The Purposes Of The Clean Water Act

Of course, the term "whenever . . . appropriate" does not fully explain when fees should be awarded. As this Court recognized in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983):

> [i]t is difficult to draw any meaningful guidance from . . . use of the word 'appropriate,' which means only 'specially suitable: fit, proper.' Obviously, in order to decide when fees should be awarded . . . a court first must decide what the award should be 'specially suitable,' 'fit,' or 'proper' *for*.

463 U.S. at 683 (internal citations omitted) (emphasis added).

In the context of statutes that cast citizen plaintiffs in the role of "private attorneys general," this Court has already determined, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that it is "appropriate" to impose a more stringent standard on prevailing defendants who seek fees. Although the statutory language at

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[8] In fact, to remove limits on judicial discretion would promote inconsistent and *ad hoc* standards of the type that Hecla purportedly seeks to avoid. *See* Petition at 23-25.

issue in *Christiansburg* did not on its face distinguish between prevailing parties, such a rule furthers the purposes of the statute. This "dual" standard, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 520 (1994), is the one that the Ninth Circuit and the district court correctly applied in denying Hecla's request for fees in this case.

The rationale for treating prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees in citizen suits is clearly explained in *Christiansburg*. *Christiansburg* interpreted the fee provision in Title VII, which contains language authorizing courts to award fees to the "prevailing party."[9] Like Hecla in this case, the prevailing defendant in *Christiansburg* argued that the plain meaning of Title VII's fee provision did not allow courts to treat prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees. The Court rejected that argument outright: "[T]he permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction." 434 U.S. at 418. Rather than treating the parties similarly, the *Christiansburg* court identified two equitable considerations that compelled a more lenient fee standard for prevailing civil rights plaintiffs, and a more difficult standard for prevailing defendants.

The first consideration is that the "plaintiff is the chosen instrument of Congress to vindicate 'a policy that

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[9] Section 706(k) provides, "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs[.]" 42 U.S.C. § 2000e-5(k). The fee provisions of the CWA and CERCLA are virtually identical.

Congress considered of the highest priority.' " 434 U.S. at 418 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)). The second consideration is that when a district court awards attorney fees to a prevailing plaintiff, it is awarding them against a violator of federal law. *Id.* To award fees against a good faith, but non-prevailing plaintiff, would discourage private enforcement and undermine the purpose of citizen enforcement provisions. *See* 434 U.S. at 422 (awarding fees to defendants "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII"). Based on these policy considerations, and backed by legislative history indicating that Congress intended to encourage citizen enforcement and deter frivolous suits, this Court held in *Christiansburg* that lower courts could award fees to a prevailing Title VII defendant only upon finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421.

This dual standard was reaffirmed in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). *Fogerty* involved a fee decision governed by § 505 of the Copyright Act, which contains fee-shifting language similar to the civil rights statutes. *See* 17 U.S.C. § 505. Unlike this case, the circuits at the time of *Fogerty* were divided over whether a prevailing defendant seeking fees under the Copyright Act should be required to establish that the plaintiff's infringement claim was frivolous or vexatious. 510 U.S. at 521 n.8. After reviewing the goals and policies of the Copyright Act, this Court declined to apply the dual standard, because the equitable considerations of the Copyright Act are not the same as the civil rights statutes.

Nor did this Court find Congressional intent in the Copyright Act to encourage plaintiffs to bring meritorious infringement claims. Rather, this Court concluded that the Copyright Act's goal of "stimulat[ing] artistic creativity for the general public good," is furthered by vigorous claims and defenses. *Fogerty*, 510 U.S. at 527 ("[D]efendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."). The Court, however, took the opportunity to reaffirm that the dual standard is appropriate under other statutes, including public interest statutes with fee-shifting language virtually identical to the fee-shifting language of the Copyright Act. *Id.* at 522-23.

Unlike the Copyright Act, both of the equitable considerations that persuaded the Court to adopt a dual standard in *Christiansburg* are present in CWA and CERCLA citizen enforcement actions. The citizen suit provisions in these laws, like the citizen suit provisions in the civil rights statutes, were enacted to encourage citizen participation in enforcing the important Congressional objective of preserving natural resources and preventing pollution. *See, e.g.*, S. Rep. No. 414, 92d Cong., 2d Sess. 64 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730 ("if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action."). In addition, when a court awards fees to a prevailing plaintiff in an environmental citizen suit, as noted in *Christiansburg*, *supra*, it is awarding fees against a violator of federal law.

Citizen suits provide a secondary benefit that should be included in the analysis of equitable considerations. They level the playing field and insure more uniform compliance, so that conscientious dischargers who comply with the provisions of CERCLA and the CWA are not at a competitive disadvantage with those who do not comply. Citizen enforcement "can provide the states, through dedicated and persistent litigation, with the level playing field that the federal government cannot provide on its own." D. Hodas, *Enforcement In a Triangular Federal System, supra,* 52 Md. L. Rev. at 1574-78.

The second equitable factor in *Christiansburg* also applies when interpreting the phrase "whenever . . . appropriate" in the CWA and CERCLA. When plaintiffs prevail, it means that the fees that are awarded will be paid by an entity that has been found to be in violation of the statute. As in *Christiansburg,* this factor supports treating prevailing plaintiffs differently than prevailing defendants. Unlike imposing fees on violators of the law, awarding fees against meritorious but non-prevailing plaintiffs would punish entities for having invested years of time and effort in performing a civic duty (enforcement of the law) with no expectation of monetary compensation.[10]

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[10] Hecla implies that the attorneys who represent citizens in these enforcement actions are mercenaries with pecuniary interests having nothing to do with enforcement of the statutes. Petition at 20-22. The mere fact that the attorneys are paid only if they prevail, however, does not suggest any impropriety. Hecla's attorneys, of course, are paid for advocating their clients interests whether they win or lose, and therefore have less incentive to advocate only meritorious arguments.

In this case, plaintiffs established that Hecla is discharging millions of gallons of toxic wastewater into the watershed above plaintiffs' community, in violation of a permit that prohibits such discharges. A jury found that Hecla was violating the CWA, and recommended that the court impose $295,000 in penalities. To order plaintiffs to pay defendant's attorney fees under such circumstances would not be "appropriate," and would certainly deter other citizens from bringing the sorts of enforcement actions that Congress so clearly intended.

B. The Evolution Of Statutory Language In Post-Clean Water Act Citizen Suit Provisions Confirms That Congress Approves Of The Dual Standard For Fees In Citizen Suits

Petitioners argue that because the Pipeline Safety Act of 1992, 49 U.S.C. § 60121(b), and several other recent statutes explicitly bifurcate the fee standard for prevailing plaintiffs and prevailing defendants, the absence of similar language in the CWA and CERCLA means by negative implication that Congress intended a single standard to be applied to both parties under the CWA and CERCLA. Petition at 11. The more explicit bifurcation in recent legislation, however, merely indicates congressional approval of the dual standard developed by courts in interpreting the "whenever . . . appropriate" language of the CWA and other public interest statutes. These enactments do not indicate that Congress meant something other than to encourage citizen enforcement under the CWA.

The citizen suit and fee-shifting provisions were added to the Pipeline Safety Act in 1976. Congress acknowledged that the purpose of the fee-shifting provisions was to "insure effective enforcement and compliance" with the Act. S. Rep. No. 852, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Adm. News 4673. In imposing a more stringent fee standard upon prevailing defendants, Congress specifically noted that this provision was consistent with *United States Steel v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974). *United States Steel* interpreted § 706(k) of the civil rights statutes. Although § 706(k), like the fee-shifting provisions of the CWA and CERCLA, does not expressly identify a fee standard for prevailing defendants, the *United States Steel* court applied a dual standard based upon the same reasoning later applied by this Court in *Christiansburg*, and declined to award fees to a prevailing defendant. By incorporating the judicially developed dual standard into the statutory language of the later Pipeline Safety Act, Congress accepted, rather than rejected, the dual standard approach to interpreting the "whenever . . . appropriate" language found both in civil rights statutes and in the CWA and CERCLA.

Congress has twice amended the CWA since the "whenever . . . appropriate" language was adopted in the citizen suit provision of the Act. *See* Act of December 27, 1977, Pub. L. No. 95-217; 91 Stat. 1566; Act of February 4, 1987, Pub. L. No. 100-4; 101 Stat 7. At the time of those amendments, courts were applying the dual standard to fee awards, and the only case to have addressed the dual standard in the specific context of a CWA citizen suit had held that the dual standard was appropriate in such case.

See, Consolidated Edison Co. v. Realty Investment Co., 524 F. Supp. 150, 153 (S.D. N.Y. 1981) (defendants may be awarded fees under CWA only if case was "objectively frivolous."). It is well established that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Had Congress disagreed with the judicial interpretations being applied to the "whenever . . . appropriate" language of the civil rights laws, the CWA, or CERCLA, it could have corrected that interpretation. Because it did not, the ratification principle suggests that Congress agrees with the dual standard developed by this Court, and its application to a broad range of public interest statutes with common fee-shifting language.

C. The Court Has Previously Recognized That It Is Appropriate To Apply Civil Rights Fee Jurisprudence To Fee Issues In Environmental Cases

Hecla argues that the *Christiansburg* standard cannot be "imported" from civil rights cases into environmental cases because "the equities, policies, and public interest considerations involved in the two kinds of cases differ greatly." Petition at 15. The differences cited by Hecla, however, are not differences at all, and support, rather than undermine, application of the *Christiansburg* dual standard to environmental cases.

This Court has previously recognized the similarities advanced by environmental and civil rights statutes and

the similarity in methods used to achieve those objectives: "Given the common purpose of both [Clean Air Act] § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 560 (1986); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1982) (interpreting fee provisions of section 1988 and of the 1964 Civil Rights Act similarly).

The legislative history of the citizen suit provision of the Clean Air Act, on which the CWA and CERCLA provisions are based, establishes that Congress was influenced by the success of citizen enforcement of the Civil Rights Act and used the Civil Rights Act citizen suit provision as a model for the Clean Air Act citizen suit provision:

> Our experience in areas of massive unlawful racial discrimination . . . tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that rights cannot be violated with impunity. Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individual affected by, or concerned about pollution in his life, the power to stop them through the legal process.

Statement of Attorney General Ramsey Clark in support of citizen suit provision of Clean Air Act of 1970, *reprinted*

in Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 728 (D.C. Cir. 1975). This Court recognized as early as *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983), that "the interpretation of 'appropriate' in § 307(f) [of the Clean Air Act] controls construction of the term in [sixteen other environmental statutes, including the Clean Water Act]."

Hecla argues that environmental cases are different from civil rights cases because civil rights cases involve absolute bars on certain behaviors, while environmental cases involve standards developed after balancing competing environmental and economic interests. Petition at 16-17. This, however, is a distinction without a difference. Regardless of how a standard is developed or where it is set, violations of the standard are prohibited. In both civil rights and environmental cases, Congress sought to enlist the aid of citizens in enforcing that law and preventing violations. Hecla cites no authority for the proposition that Congress was less concerned with violations of environmental laws than it was with violations of civil rights laws, and Respondents are unaware of any such authority.

Petitioner's argument that citizen suits supplement EPA's enforcement authority, whereas civil rights laws are enforced directly by injured parties (Petition at 17), is also beside the point. Congress meant to encourage citizen enforcement in both cases, and the dual standard adopted in *Christiansburg* is necessary to achieve Congressional purposes in both cases.[11] Perhaps more

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[11] Petitioners point to the sixty-day notice requirement and "diligent prosecution" defenses of the CWA and CERCLA as

importantly, because plaintiffs in environmental citizen suits do not stand to gain financially from acting as private attorneys general, they will be unwilling to risk prosecuting even meritorious cases if faced with the risk of paying a defendant's fees when, as in this case, they succeed on the merits but lose on a procedural issue. The interpretation urged by Hecla would thus "render[ ] the [citizen suit] statute useless, in all or nearly all instances, to effect the very object it was originally enacted to accomplish." *Keene Corp. v. United States*, 508 U.S. 200, 213-14 (1993).

D. The Legislative History Of The CWA And CERCLA Support This Court's Dual Standard Approach

Hecla argues that because Congress rejected a provision that would have made fee awards mandatory under the CWA, and instead adopted a provision that made awards discretionary, Congress necessarily meant to leave courts complete discretion to award fees to either plaintiffs or defendants. Petition at 14 (citing S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971), *reprinted in* 1972

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evidence that "Congress sought to encourage only those citizen suits designed to benefit the environment while discouraging lawsuits which will have no beneficial effect on the environment." Petition at 19. Again, this observation does not indicate that Congress was less concerned with enforcement of environmental laws than civil rights laws. Assuming the sixty-day notice and diligent prosecution provisions are satisfied, the analysis is the same – did Congress intend to encourage citizen enforcement? The answer is yes in both environmental and civil rights cases.

U.S.C.C.A.N. 3668, 3747). Hecla's conclusion, however, is not compelled or even supported by the language on which Hecla relies. A decision to authorize, but not compel, courts to award fees hardly means that Congress intended courts to have unlimited discretion. The more direct legislative history of both the CWA and CERCLA shows that Congress intended to use fee awards to encourage citizen suits, and limit awards to defendants to cases in which suits were found to be frivolous or harassing – the very standard that has been consistently applied by courts, including this Court, in cases where Congress has authorized citizens to enforce public laws.

The first environmental statute to authorize citizens to sue and recover fees and costs when they prevail was the Clean Air Act of 1970 (CAA). The CAA provided that fees could be awarded to "any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). This provision has served as a model for other environmental citizen suit provisions that have come after it, including the CWA citizen suit provision. As this Court noted in *Ruckleshaus v. Sierra Club, supra,* 463 U.S. at 682, n.1, "the interpretation of 'appropriate' in § 307(f) controls construction of the term in [sixteen other environmental] statutes [including the CWA]." The Senate Report on the CAA explains the legislative understanding of when an award of fees to a defendant might be "appropriate":

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable

> attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award cost of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

S. Rep. No. 1196, 91st Cong., 2d Sess. 36-39 (1970) (quoted in *NRDC v. Train*, 510 F.2d 692, 725 (D.C. Cir. 1975)). As noted in *Train*, 510 F.2d at 728, Congress adopted the fee-shifting provisions of the CAA citizen suit in part due to the success of a similar provision in the Civil Rights Act in forcing compliance with the Act.

The next environmental law adopted by Congress with a fee-shifting citizen suit provision was the Federal Water Pollution Control Act Amendments of 1972 (later renamed the Clean Water Act). The fee-shifting language of the CWA was virtually identical to that of the CAA. And as with the CAA, Congress made clear that the "whenever . . . appropriate" language was intended to encourage citizen enforcers, and provide for awards to defendants only when cases were "frivolous." *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971) ("The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing.").

By the time the citizen suit provision of CERCLA was adopted in 1986, Congress had echoed the "frivolous or harassing" language in the legislative history of a number

of environmental statutes,[12] and it did so again with CERCLA. CERCLA provides for an award of fees to "the prevailing or substantially prevailing party whenever the court determines such award is appropriate." The Senate Report accompanying CERCLA states:

> As with similar provisions in other environmental citizens suit laws, this will encourage private enforcement by allowing such awards to private

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[12] *See, e.g.*, Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (court may award fees to any party "whenever appropriate"); S. Rep. No. 92-451, *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249-50 (court may award fees to defendant if "the court concludes that the purpose of the suit was harassment. . . . "); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (court may award fees to party "whenever the court determines such award is appropriate"); H. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973) (fee provisions are to "be interpreted in the same fashion" as the MPRSA); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (court may award fees to party "where the court determines such award is appropriate."); S. Rep. No. 231, 93d Cong., 1s: Sess. 17 (1973) (court may award fees to prevailing defendants only "as a deterrent against frivolous suits. . . . "); Toxic Substances Control Act of 1976, 15 U.S.C. § 2618(d) (fees may be awarded "if the court determines such award is appropriate"); 122 Cong. Rec. 8300 (March 26, 1976) ("The standard for awarding fees and costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk to the average citizen of bringing suit under this section would be so great that it would discourage such suits") (Statement of Senator Tunney in support of S. 3149); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (court may award fees to any party "whenever the court determines such award is appropriate."); S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977) (court may award fees to defendant only if defendant shows suit was brought in "bad faith" – standard is intended to be the same as for other environmental laws).

> plaintiffs where the court determines the bringing of the action was in the public interest, while discouraging frivolous suits by allowing costs to be awarded to defendants in appropriate cases.

S. Rep. No. 11, 99th Cong., 1st Sess. 63 (1985).[13]

Congress has extensive experience in drafting citizen suit legislation, and is well aware of the dual standard that courts, including this Court, have applied in cases where citizens have been authorized to enforce public laws. Congress has consistently expressed approval of that standard. Far from supporting Hecla's argument, the legislative history of the CWA, CERCLA, and other environmental legislation supports the Ninth Circuit's application of the *Christiansburg* standard to Hecla's fee application in this case.

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[13] The Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act, or RCRA), contains fee-shifting language similar to other environmental legislation. 42 U.S.C. § 6972(e). Although the legislative history of this provision does not discuss the dual standard or the meaning of "whenever . . . appropriate," courts interpreting the provision have determined that the dual standard applies, based on this Court's reasoning in *Christiansburg*, *Ruckelshaus*, and *Pennsylvania v. Delaware Valley Citizens Council*, *supra*. *See PaineWebber Income Prop. v. Mobil Oil*, 916 F. Supp. 1239, 1243-44 (M.D. Fla. 1996); *Palumbo v. Waste Technologies Industries*, 1994 U.S. App. LEXIS 29355 (4th Cir. Oct. 20, 1994); *Truck Components, Inc. v. Beatrice Co.*, 1996 U.S. Dist. LEXIS 9946 (N.D. Ill. July 15, 1996).

II. THERE IS NO DISCREPANCY AMONG THE LOWER COURTS FOR THIS COURT TO CLARIFY

Hecla's statement that lower courts are applying "a multiplicity of ad hoc standards" (Petition, at 23) stems from a gross misreading of numerous court opinions. Hecla is attempting to create confusion where none exists. In reality, lower courts are uniformly applying the dual standard when making fee determinations in environmental citizen suits. Respondents are unaware of any decision in which a court has applied the unlimited discretion that Hecla asks this Court to approve. There is simply no unsettled law for this Court to clarify.

Hecla points to four cases in which, it argues, courts did apply such a standard. Even a generous reading of the brief fee discussions in those cases, however, does not support Hecla's argument. Other than reciting statutory language, none of the courts elaborated on the basis for their fee decisions. Hecla seems to believe that the courts' recitation of statutory language alone is equivalent to pronouncing that those courts were using a single discretionary standard, rather than the dual standard endorsed by this Court. This is not correct.

In *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1175 (5th Cir. 1987), and *Pape v. Manistisque Papers, Inc.*, 114 F.3d 1188 (6th Cir. 1997), the two cases in which a prevailing defendant was awarded fees, the claims were summarily dismissed, one for lack of evidence and the other for lack of standing and jurisdiction over pendent state law claims. Without any express statement from these courts as to the standard they applied, the facts of the cases strongly imply that the courts used the dual standard

and, upon finding the plaintiffs' claims to be frivolous, awarded fees to the prevailing defendant. In the remaining two cases cited by Hecla, the courts declined to award fees to the prevailing defendant. *See Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 670 (E.D. Mich. 1992); *Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp.*, 1994 WL 675297 (E.D. Pa. Nov. 21, 1994). These cases contain so little discussion regarding the bases for their fee decisions, that one can only guess, as Hecla did, as to the standard that the courts applied.

In contrast, courts throughout the circuits routinely apply the dual standard and consistently require prevailing defendants to establish, as the Ninth Circuit does, that a plaintiff's claim was "unreasonable, frivolous, or without foundation." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995). *See Atlantic States Legal Foundation v. Onondaga Department of Drainage and Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995) ("frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it became so"); *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819, 821 (E.D. Wash. 1993) ("meritless, groundless, or without foundation"); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 63 (W.D. Mich. 1989) ("frivolous, meritless, or vexatious"); *Consolidated Edison Co. v. Realty Investment Assoc.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) ("objectively frivolous"). Hecla's claim that these virtually identical standards are "ad hoc" and "confusing" is simply wrong.

Hecla also points to some courts' references to bad faith or vexatious conduct as a sign of confusion regarding the proper standard for fee awards. Petition at 24. Bad faith, however, is a separate and additional ground that,

if established, would also warrant an award of fees to a prevailing defendant. *See* 28 U.S.C. § 1927 (authorizing an award of fees against any attorney who "multiplies the proceedings in any case unreasonably and vexatiously"); *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116, 129 (1974) ("We have long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, or for oppressive purposes."). Courts have not required prevailing defendants to establish bad faith in addition to a groundless or frivolous claim, but have merely noted that bad faith may separately justify an award of fees. *See, e.g., PaineWebber Income Props. v. Mobil Oil Corp.*, 916 F. Supp. 1239, 1242 (M.D. Fla. 1996) (citing common law standard); *Washington Trout*, 823 F. Supp. at 821 (citing 28 U.S.C. § 1927).

CONCLUSION

Hecla has presented no reason, much less any compelling reason, for this Court to revisit the well established standard that prevailing defendants must show that citizen plaintiffs acted frivolously or unreasonably before such defendants may recover attorney fees under the CWA and CERCLA. Respondents respectfully request that this Court deny Hecla's petition for a writ of certiorari.

Respectfully submitted,

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